

Challenging State Sales Tax Statutes on Electronic Commerce Under the Dormant Commerce Clause

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I. INTRODUCTION

The dormant Commerce Clause has long been a tool used by the courts to nullify state legislation across all platforms that invoke interstate commerce. State taxation laws that are intertwined with

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interstate commerce are no exception. For decades, the Supreme Court of the United States has struck down state taxation laws because they violated the dormant Commerce Clause.

In this ever-growing technological world, the amount of commerce that is done electronically continues to grow each year. Electronic commerce (E-commerce) increases the ability of sellers to engage in interstate and international commerce through direct interaction with potential buyers. Such direct interaction enables a wide range of vendors to make sales and conduct other business activity in a state without establishing a physical presence there or being required to submit sales tax.¹

The percentage of Americans that shopped online during the 2015 holiday season was 46.1%, or nearly half the country. That is up from 44.4% in 2014 and is the highest percentage of online shoppers since the study began tracking in 2006.² In the same study, percentages of Americans using a device to shop or buy are 47.5% and 34.5%, respectively.³ An example of the growth of E-commerce is found by looking at the number of Americans that have participated in “Cyber Monday,” which takes place the Monday after Black Friday.⁴ In 2005, 59 million Americans took part in Cyber Monday; in 2014, that number more than doubled to 127 million.⁵ In total, \$79.4 billion dollars were spent online in 2015, a 13.9% increase from the previous year.⁶

¹ Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 B.Y.U. L. REV. 9, 11 (2000).

² Kathy Grannis Allen, *Retailers in for a Very Digital Holiday Season, According to NRF Survey*, NAT'L RETAIL FED'N (Oct. 20, 2015), <https://nrf.com/media/press-releases/retailers-very-digital-holiday-season-according-nrf-survey> [<https://perma.cc/G3ZA-ECKG>].

³ *Id.*

⁴ Cyber Monday is a marketing strategy that encourages consumers to purchase items online by offering substantial deals.

⁵ *Amount of Cyber Monday Shoppers in the United States from 2005 to 2014*, STATISTA: THE STAT. PORTAL (Jan. 1, 2016), <http://www.statista.com/statistics/194643/us-e-commerce-spending-on-cyber-monday-since-2005/> [<https://perma.cc/BF58-LZK7>].

⁶ *U.S. retail e-commerce holiday season sales from 2012-2015*, STATISTA: THE STAT. PORTAL (Jan. 1, 2016), <http://www.statista.com/statistics/241945/us-retail-e-commerce-holiday-season-revenue> [<https://perma.cc/5JSF-VYSZ>].

The cultural change does not just exist around the holiday season. At the end of the second quarter in 2015, Amazon surpassed Wal-Mart Stores as the largest retailer by market value in the world.⁷ Amazon is a completely E-commerce-based retailer. Online stores, not brick-and-mortar stores, spurred growth among all U.S. retailers in 2014. Internet retailers grew their combined sales by 16.2% in 2014, while all other retail sales, which include stores, catalogs, TV infomercials, and other forms of direct marketing, increased by just 2.4%.⁸

The battle between E-commerce retailers versus brick-and-mortar retailers has dispersed as a part of this cultural change. A new path has emerged, called omnichannel. In order to maintain a high level of sales, retailers like Wal-Mart, Macy's, and Target, among others, have been forced to adapt by maintaining their physical locations, but also making more merchandise available online to meet the rising consumer demand.⁹ Marge Laney, president of Alert Technologies, described the evolution, observing that "omnichannel is the new reality for all retailers whether they engage or not. If you're available where and when consumers look for you, great. If not, you lose to someone who is."¹⁰

All this cultural change and expansion, to the point of billions of dollars in revenue, is a preface to the problem that exists. States rely heavily on the revenue generated from sales and use taxes. According to the U.S. Census Bureau, in the fiscal year 2010, the percentage of revenue that came from these taxes equated to 34%, which was just 1% below property tax for the largest revenue generator for a state.¹¹ In 2015, sales and gross receipts tax amounted to \$431 billion dollars in

⁷ Shannon Pettypiece, *Amazon Passes Wal-Mart as Biggest Retailer by Market Value*, BLOOMBERG NEWS (July 23, 2015), <http://www.bloomberg.com/news/articles/2015-07-23/amazon-surpasses-wal-mart-as-biggest-retailer-by-market-value> [https://perma.cc/S4ZG-ZN6J].

⁸ Mark Brohan, *E-commerce Sales Grow Six Times Faster for U.S. Top 500 Merchants than Total Retail Sales*, INTERNET RETAILER (Apr. 13, 2015), <https://www.internetretailer.com/2015/04/13/e-commerces-sales-outgrow-total-retail-sales-2014> [https://perma.cc/UJN2-ZD6J].

⁹ David P. Schulz, *Top 100 Retailers 2015*, NAT'L RETAIL FED'N (July 1, 2015), <https://nrf.com/news/top-100-retailers-2015> [https://perma.cc/4UE5-6C3S].

¹⁰ *Id.*

¹¹ Liz Malm & Ellen Kant, *The Sources of State and Local Tax Revenues*, TAX FOUND. (Jan. 28, 2013), <http://taxfoundation.org/article/sources-state-and-local-tax-revenues> [https://perma.cc/M8UP-BDDJ].

revenue for the fifty states.¹² Ohio, for example, has moved to a more sales-tax-focused revenue stream. Governor John Kasich has moved to decrease the income tax rate and increase the sales tax rate.¹³ The effects for the last fiscal year resulted in 47.1% of tax revenue coming from sales and gross receipts, while income tax revenue came to 42.3%.¹⁴ This also resulted in \$2,437 of tax collected per capita for the state of Ohio, which ranked 34th nationally.¹⁵

Advances in technology have shifted buyers to the internet for more and more of their shopping. It brings up an issue that could significantly influence state budgets, especially those who rely heavily on their sales tax. Rarely, if ever, does a buyer purchase an item from Amazon or another online retailer that is not shipped from somewhere else in the country or world. The question that arises is, if a state chooses to assess a sales tax to an item that is moving through interstate commerce, does this violate the dormant Commerce Clause?

This article is different from many of the scholarly articles that discuss a similar topic because of this article's broad focus. Many articles focus on a singular point or part of the dormant Commerce Clause doctrine and its relation to the taxation of E-commerce. This article will instead look at the whole picture and analyze each part of the dormant Commerce Clause and the taxation of E-Commerce, as well as show the alternatives that have been discussed and implemented in helping the states with this complex question.

The analysis proceeds as follows: Part II(A)-(B) reviews the dormant Commerce Clause in its origin and functionality; Part II(C) reviews the origin and functionality of the Sales Tax; Part III explains the *Complete Auto* test, which all taxation issues are measured against; Part IV highlights actions the states and Congress have taken

¹² 2015 *Annual Survey of State Government Tax Collections*, U.S. CENSUS BUREAU (2015), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [https://perma.cc/32DC-A42H].

¹³ Jim Siegel, *Debate over Ohio's shift from income tax to sales tax continues*, COLUMBUS DISPATCH (Mar. 1, 2015), <http://www.dispatch.com/content/stories/local/2015/03/01/income-shift.html> [https://perma.cc/4C9G-GBJF].

¹⁴ 2015 *Annual Survey of State Government Tax Collections*, *supra* note 12.

¹⁵ Rich Exner, *Tax collections in Ohio up about \$100 per person; but Ohio ranks low among states*, CLEVELAND.COM (Sept. 27, 2016), http://www.cleveland.com/datacentral/index.ssf/2016/09/tax_collections_in_ohio_up_a_bo.html [https://perma.cc/WP8Y-Z2PA].

in order to combat the issue; Part V explains how the dormant Commerce Clause has been applied to other taxation issues and how the Supreme Court has ruled; Part VI will bring in the current issue of individual states assessing a sales tax to goods moving in interstate commerce and whether the rules as laid out by the Supreme Court would render this specific tax unconstitutional as a violation of the dormant Commerce Clause; and finally Part VII will look to the future of this issue and the kinds of actions that will take place on both the legislative and judicial landscapes.

II. ORIGIN AND FUNCTIONALITY OF THE DORMANT COMMERCE CLAUSE AND SALES TAX

A. *Dormant Commerce Clause (Origin)*

The idea of regulating interstate commerce as an exclusive federal power first occurred during the Constitutional Convention. On September 17, 1787, the framers finished and signed the U.S. Constitution. Included in Article 1, Section 8 is, to a certain extent, the exclusive power to regulate interstate commerce.¹⁶ The article gives the federal government the power “to regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes.”¹⁷ Therefore, the fifty individual states are limited in their ability to legislate on matters that involve interstate commerce.

Throughout the discussion during the Constitutional Convention and then in the final ratified document, the Commerce Clause never included the word “dormant” or any allusion to what the doctrine would become. Thus, for the first thirty years of the United States there was no dormant Commerce Clause. Since then, even in the absence of affirmative Congressional law, the Supreme Court has used the dormant Commerce Clause as a basis to strike down state laws that unduly burden interstate commerce.

The origin of the doctrine began with *Gibbons v. Ogden*, the first Commerce Clause case the Supreme Court decided.¹⁸ Chief Justice John Marshall used the word “dormant” in dicta. He wrote that the

¹⁶ U.S. CONST. art. I, § 8, cl. 3.

¹⁷ *Id.*

¹⁸ *Gibbons v. Ogden*, 22 U.S. 1 (1824).

power to regulate commerce “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”¹⁹ Five years later, Chief Justice Marshall again wrote for the majority, stating that “We do not think that the state act empowering Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”²⁰

If the framers of the original Commerce Clause to the U.S. Constitution set out for that clause to give exclusive power to the federal government, then the dormant Commerce Clause, which is also known as the negative Commerce Clause, has developed to hold the opposite. The dormant Commerce Clause treats regulations that *do not* discriminate against or unduly burden interstate commerce as a concurrent power, since these regulations are largely upheld, showing that the state has some power with respect to the Commerce Clause. It treats regulations that *do* discriminate against or unduly burden interstate commerce as an exclusive federal power that usually are ruled unconstitutional. Therefore, the modern doctrine of the Commerce Clause has been held to mean that Congressional power over interstate commerce is not entirely an exclusive federal power.²¹

The modern approach to the dormant Commerce Clause began in 1851. In *Cooley v. Board of Wardens*,²² Justice Curtis wrote for the Court, stating “[e]ither absolutely to affirm, or deny that the nature of this commerce power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part.”²³ This sets up the foundation of the dormant Commerce Clause and how courts have applied the doctrine to state legislation.

Today, the dormant Commerce Clause is seen to extend as far in scope as the Commerce Clause. Specifically, in *Trailer Marine Transport Corp. v. Rivera Vazquez*, the Court extended the reach of

¹⁹ *Id.* at 189.

²⁰ *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829).

²¹ Frank Pommersheim, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONST.* 212-13 (2009).

²² *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

²³ *Id.* at 319.

the dormant Commerce Clause to include Puerto Rico.²⁴ The Court has also developed a provision of the dormant Commerce Clause that speaks to the issue of goods moving between countries.²⁵

B. Dormant Commerce Clause (Functionality)

“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”²⁶ With this in mind, the Court takes two different lines of analysis when a dormant Commerce Clause case comes before it. The first line of analysis is whether the state legislation discriminates against interstate commerce or against out-of-staters.²⁷ If discriminatory laws are motivated by simple economic protectionism, then they are subjected to a virtually per se rule of invalidity.²⁸ Further, if the state law discriminates against interstate commerce, then it is subject to “the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”²⁹

The clearest example of a law that is discriminatory in nature against interstate commerce is a law that overtly blocks the flow of interstate commerce at a state’s borders.³⁰ This test can only be overcome by the State showing that it has no other means to advance a legitimate local purpose; a discriminatory law rarely, if ever, overcomes that burden.³¹

The second dormant Commerce Clause line of analysis applies when a state law is nondiscriminatory on its face, but the law imposes a burden on interstate commerce that is “clearly excessive in relation

²⁴ *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 7-8 (1st Cir. 1992).

²⁵ *Wardair Canada, Inc. v. Florida Dep’t of Revenue*, 477 U.S. 1 (1986).

²⁶ *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

²⁷ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

²⁸ *Id.*

²⁹ *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

³⁰ *See City of Philadelphia*, 437 U.S. at 624.

³¹ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

to the putative local benefits.”³² Where other legislative objectives are credibly advanced and there is no patent discrimination against interstate commerce, the Court has adopted a more flexible approach.³³ The Court applies a balancing test in these cases: “Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”³⁴

When weighing burdens against benefits, a court should consider both “the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities.”³⁵ Therefore, regulations designed to implement public health and safety, or to serve other legitimate state interests, but which impacts interstate commerce as an incident to that purpose, are subject to a test similar to the rational basis test.³⁶ As we use the term “discrimination,” it means differential treatment of in-state vs. out-of-state economic interests that benefits the former and burdens the latter.³⁷

The party challenging the validity of a state law or local ordinance bears the burden of showing that it discriminates against, or places some burden, on interstate commerce.³⁸ If discrimination is established, the burden then shifts to the government to show that the local benefits of the law outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interest.³⁹ If the

³² *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959); rational basis is a Supreme Court scrutiny test that says the Court will uphold a law if it is rationally related to a legitimate government purpose.

³⁷ *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (1995).

³⁸ *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

³⁹ *Id.*

challenging party cannot show that the law is discriminatory, then it must demonstrate that the statute places a burden on interstate commerce that “is clearly excessive in relation to the putative local benefits.”⁴⁰

The heightened scrutiny test for discriminatory laws and the balancing test for more neutral laws that burden interstate commerce form the core of the dormant Commerce Clause doctrine. However, there is a third, more unsettled part of the doctrine. It is also said that the dormant Commerce Clause prohibits certain state laws that regulate extraterritorially and others that lead to inconsistent regulatory burdens.⁴¹

The Court has invalidated state laws on the ground that it regulates extraterritorially. *Healy v. Beer Institute* involved a Connecticut law requiring beer companies to post prices monthly and affirm that they were not charging more for their beer than in three contiguous states.⁴² The law had the effect of limiting the ability of out-of-state beer shippers to alter their prices outside of Connecticut during the same month. After noting that the “critical inquiry” under the dormant Commerce Clause “is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State,” the Court invalidated the law.⁴³ It reasoned that the Connecticut law had the “extraterritorial effect” of preventing brewers from undertaking competitive pricing in Massachusetts based on prevailing market conditions.⁴⁴

The scope of the extraterritoriality principal is unclear.⁴⁵ The Full Faith and Credit and Due Process Clauses of the U.S. Constitution prohibit states from regulating out-of-state conduct unless the conduct creates a “significant contact” or “significant aggregation of

⁴⁰ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁴¹ Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001).

⁴² *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

⁴³ *Id.* at 336.

⁴⁴ *Id.* at 338.

⁴⁵ Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884 (1987).

contacts" with the state.⁴⁶ The Supreme Court has suggested that the extraterritoriality principal goes further and "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."⁴⁷ This form seems facially too broad, as several state laws that regulate extra-state commercial conduct that produces harmful local effects are deemed valid.

Finally, the dormant Commerce Clause also prohibits state regulations that "adversely affect interstate commerce by subjecting activities to inconsistent regulations."⁴⁸ However, this test is also unclear. It does not mandate state-law uniformity; firms that operate in interstate commerce often face different regulations in different states.⁴⁹

The dormant Commerce Clause doctrine has followed two different lines of rationale from the Supreme Court when dealing with state taxation statutes: a formalistic approach taken by the pre-New Deal Court and a less rigid, less formal approach taken by the post-New Deal Court. The Court had an early view that interstate commerce was wholly immune from state taxation "in any form,"⁵⁰ even though the same amount of tax should be laid on intrastate commerce.⁵¹ This line of thinking gave way to the formal approach. For example, the Court would invalidate a state tax levied on gross receipts from goods sold in interstate commerce,⁵² or upon the "freight carried" in interstate commerce.⁵³ Nevertheless, the Court would allow a tax measured by gross receipts from interstate

⁴⁶ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

⁴⁷ *See Healy*, 491 U.S. at 336.

⁴⁸ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987).

⁴⁹ *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982).

⁵⁰ *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888).

⁵¹ *Robbins v. Shelby Cty. Taxing Dist.*, 120 U.S. 489, 497 (1887).

⁵² *N.J. Bell Tel. Co. v. State Bd. of Taxes and Assessments of N.J.*, 280 U.S. 338, 349 (1930).

⁵³ *Case of the State Freight Tax*, 82 U.S. 15 Wall. 232, 278 (1872).

commerce as long as the tax was formally imposed upon franchises,⁵⁴ or “in lieu of all tax upon the taxpayer’s property.”⁵⁵

Following the change in how the Court reviewed Congressional powers, the New Deal Court began to change its approach to their view on state taxation schemes and the dormant Commerce Clause. The formalism structure began to give way in *Western Live Stock v. Bureau of Revenue*.⁵⁶ This case examined a New Mexico franchise tax measured by gross receipts. New Mexico applied the tax to receipts from out-of-state advertisers in a journal produced by taxpayers in the state, but circulated both inside and outside the state.⁵⁷ Even though the Supreme Court upheld the tax scheme based on prior precedent, Justice Stone wrote in furtherance of point that “it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.”⁵⁸

The transition period presented its own challenges, as the Court did not show any kind of consistency by the cases it took or how it decided. The Court would take certain cases and examine them based on their economic impact, while others were taken and examined based on the type of tax scheme the state was attempting to levy. There were occasions where a tax was held to violate the dormant Commerce Clause. Then the state would simply pass the exact same bill with the exact same economic impact, changing only the name, and it would withstand review. This idea can be seen in the *Railway Express I* and *Railway Express II* cases, in which the tax scheme of Virginia first violated the dormant Commerce Clause; the state then turned around, reworded the language of the tax and it passed review.⁵⁹

The final blow to the formalist approach of the dormant Commerce Clause came in 1977 with *Complete Auto Transit, Inc. v.*

⁵⁴ *Maine v. Grand Trunk Ry. Co.*, 142 U.S. 217, 227 (1891).

⁵⁵ *U.S. Express Co. v. Minnesota*, 223 U.S. 335, 346 (1912).

⁵⁶ *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

⁵⁷ *Id.* at 252.

⁵⁸ *Id.* at 254.

⁵⁹ *Ry. Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954); *Ry. Express Agency, Inc. v. Virginia*, 358 U.S. 434 (1959).

Brady.⁶⁰ The Court upheld a Mississippi privilege tax upon a Michigan company engaged in the business of shipping automobiles to Mississippi dealers.⁶¹ The argument against the tax relies on the *Spector* rule that states could not assess privilege taxes on out-of-state companies only doing business in the state through interstate commerce, regardless of the practical effect of the tax. The rule reflects an underlying philosophy that interstate commerce should enjoy a sort of “free trade” immunity from state taxation, which is not the case.⁶²

The *Complete Auto* case is the culmination of the present day dormant Commerce Clause doctrine. It served as the last case rejecting a per se approach to state taxation laws. The Court noted that, “no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned.”⁶³ The four-part present-day test created by *Complete Auto* examines a statute for a sufficient nexus with the state, whether the tax discriminates against interstate commerce, whether the tax is unfairly apportioned, and whether it is unrelated to the services provided by the state.^{64 65}

The sales tax statutes that many states have passed will be taken against all of these dormant Commerce Clause principals in order to develop a conclusion as to whether the sales tax statutes at both a state and municipal level violate the dormant Commerce Clause.

C. Sales Tax (Origin)

⁶⁰ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

⁶¹ *Id.*

⁶² *Id.* at 278.

⁶³ *Id.* at 287.

⁶⁴ *Id.* at 277-78.

⁶⁵ See the following as examples of *Complete Auto* test; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (severance tax); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983) (franchise tax); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) (use tax); *Goldberg v. Sweet*, 488 U.S. 252 (1989) (tax on telephone calls).

A sales tax is a specific tax paid to a governing body for the sale of certain goods and services.⁶⁶ In most sales tax structures, the seller holds the burden of collecting and remitting the sales tax to the taxing authority. In the event that the seller does not collect, or fails to collect the correct amount, they then become liable to the taxing authority.⁶⁷ Usually taxing authorities allow the sellers to keep a percentage of the tax collected as incentive to administer the structure.⁶⁸ If the taxing authority still levies a sales tax, but cannot force a seller to collect or remit sales tax, the buyer is responsible for paying the tax to the authority. However, the taxing authority has little way of tracking who owes or enforcement power to compel payment from the buyer. The sales tax base is the sales price of tangible personal property.⁶⁹ Since the sales price includes all costs of production, the tax appears as a gross receipts tax. However, because the individual is ultimately liable for paying the tax it falls under the definition of an indirect tax.⁷⁰

Taxes imposed on the sale of goods have been around for thousands of years. They first were depicted on the walls of ancient Egyptian tombs, which date back as far as 2000 B.C.⁷¹ These paintings show the collection of taxes for specific goods, such as oil.⁷² They were collected on the sale of slaves in Greece around 415 B.C.⁷³ In the United States, the Constitution provides the federal government with the power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States.⁷⁴

⁶⁶ William Joel Kolarik II, *Untangling Substantial Nexus*, 64 TAX L. 851, 855 (2011).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 854.

⁷⁰ *Id.*

⁷¹ WILLIAM F. FOX, U. TENN. KNOXVILLE, CTR. FOR BUS. AND ECON. RES., HISTORY AND ECONOMIC IMPACT: SALES TAX HISTORY (2002), <http://cber.bus.utk.edu/staff/mnmecon338/foxipt.pdf> [<https://perma.cc/M2EL-7EUQ>].

⁷² *Id.*

⁷³ MATTHEW DILLON & LYNDA GARLAND, ANCIENT GREECE: SOCIAL AND HISTORICAL DOCUMENTS FROM ARCHAIC TIMES TO THE DEATH OF ALEXANDER THE GREAT 188 (3d ed. 2010).

⁷⁴ U.S. CONST. art. I, § 8, cl. 1.

In the United States, the sales tax dates to the early 19th century in Pennsylvania. This initial sales tax was levied against the mercantile industry and like many of the sales based taxes in this day, it was not a broad tax, but rather was specific to an industry.⁷⁵ The sales tax is a popular tax among the state and local governments because it is generally seen as one of the least harmful taxes when it comes to economic growth. It also is considered a regressive tax, because it is a flat rate and does not increase based on wealth. Thus, it can be considered a fairer tax.⁷⁶

Even with the taxation power in the United States Constitution, the federal government has never levied a broad-based sales tax. The government first introduced an excise tax against whiskey in 1791, which led to the Whiskey Rebellion in 1794.⁷⁷ To the present day, the federal government remains selective on the sales tax it levies. Notable examples include taxes against gasoline and cigarettes.⁷⁸

The Great Depression is attributed to the development of the modern state sales tax in an effort by the states to generate more revenue.⁷⁹ Kentucky is credited with the first tax levied exclusively on retailers, passed in 1930. Originally, it was a progressive tax but Kentucky replaced it in 1934 with a flat rate.⁸⁰ Today 45 states and the District of Columbia collect a statewide sales tax; only Alaska, Delaware, Montana, New Hampshire, and Oregon do not. In addition, 38 states collect a second-tier local sales tax; while Connecticut, Delaware, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Rhode Island, and the District of Columbia do not.⁸¹

⁷⁵ FOX, *supra* note 71.

⁷⁶ *America the Uncompetitive*, WALL ST. J. (Aug. 15, 2008), <http://www.wsj.com/articles/SB121875570585042551> [<https://perma.cc/QC2L-9W3B>].

⁷⁷ WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY 27 (2006).

⁷⁸ FOX, *supra* note 71.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Scott Drenkard & Jared Walczak, *State and Local Sales Tax Rates in 2015*, TAX FOUND. (Apr. 8, 2015), <http://taxfoundation.org/article/state-and-local-sales-tax-rates-2015> [<https://perma.cc/DG55-CKLA>].

This leads to significant discrepancies between the states, since four states (Delaware, Montana, New Hampshire, and Oregon) have no sales tax, while five states (Alabama, Arkansas, Louisiana, Tennessee, and Washington) have the highest rates in the country, depending on what locality the consumer is buying from, ranging from 8.89% to 9.45%, with all the other states falling in the range.⁸² The difference between the sales tax rates not only affects the revenue being generated, but the higher rates also lead consumers to buy products across borders and online, leading to a run on state revenue.

D. Sales Tax (Functionality)

The sales tax operates in a three-tiered system (federal, state, and local). Currently, there are over 7,500 different tax jurisdictions in the United States.⁸³ The federal government has not levied any general sales tax; therefore, there are only certain products that would see an increase in price due to a federal government tax. However, almost all of the states and many localities across the country will assess a general sales tax on all purchases. The state sales tax generates revenue for the state and the local sales tax generates revenue for the municipality. State laws and local ordinances mandate that the business collect and turn over the tax to the government; if the business is not required to collect the tax, then the individuals are required to report and pay the tax themselves.⁸⁴

The revenue lost from failure to collect the tax owed, especially from out-of-state transactions and E-commerce transactions, has grown significantly over the past fifteen years. In the mid-2000s the Congressional Budget Office estimated that as much as \$20.4 billion went uncollected. That number could have climbed to as much as \$55 billion in the last five years.⁸⁵ These numbers include all sales such as mail orders, catalog, and E-commerce vendors. When analyzing the

⁸² *Id.*

⁸³ Kolarik, *supra* note 66, at 856.

⁸⁴ Chris O'Brien, *Um, About Those Tax-Free Internet Purchases . . . You Still Owe Taxes On Them*, SILICONBEAT (Sept. 12, 2012), [http://www.siliconbeat.com/2012/09/12/8955/\[https://perma.cc/U3ZW-EJLH\]](http://www.siliconbeat.com/2012/09/12/8955/[https://perma.cc/U3ZW-EJLH]).

⁸⁵ CONG. BUDGET OFF., ECONOMIC ISSUES IN TAXING INTERNET AND MAIL-ORDER SALES (2003), <https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/10-20-internettax.pdf> [https://perma.cc/F2EA-424T].

effect at the local level, New York City lost \$200 million in uncollected sales tax in 2012. Phoenix and Chicago lost \$18 million and \$17 million respectively. With the increase in online and remote sales, these numbers are expected to rise.⁸⁶

The failure to collect revenue is just the consequence; the real problem exists with the enforcement and compliance of the existing sales/use tax laws. Unless the vendor involved in the transaction has a physical location or nexus within a state, the vendor cannot be required to collect taxes for that state.⁸⁷ If the vendor is not required to collect and hand over the tax, then the burden falls to the individual to report the tax, which, as one could expect, rarely ever happens. For instance, in North Carolina the tax compliance with the use tax laws were less than 4%.⁸⁸ However, the Supreme Court did state that Congress could override the physical presence requirement by passing a law that requires all vendors, whether they have a physical presence in the taxing state, to collect and remit sales tax.⁸⁹

III. COMPLETE AUTO EXPLAINED

This section provides an in-depth look at the four-pronged test established in *Complete Auto*.⁹⁰ Each of the four prongs concern a different burden on interstate commerce that should be avoided.⁹¹ The substantial nexus prong is derived from the proposition that a state may not exact a tax unless the tax “bears fiscal relation to protection, opportunities and benefits provided by the state.”⁹² The burden associated with fair apportionment concerns the risk of multiple

⁸⁶ *Billions in uncollected sales tax lost this year: Report*, INT’L COUNCIL OF SHOPPING CTR. (July 1, 2013), <http://www.icsc.org/press/billions-in-uncollected-sales-tax-lost-this-year-report> [<https://perma.cc/8GV7-ZPF2>].

⁸⁷ *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992).

⁸⁸ Scott W. Gaylord & Andrew J. Haile, *Constitutional Threats in the E-Commerce Jungle: First Amendment and Dormant Commerce Clause Limits on Amazon Laws and Use Tax Reporting Statutes*, 89 N.C. L. REV. 2011, 2017 (2011).

⁸⁹ *See generally Quill*, 504 U.S. at 318.

⁹⁰ *Id.*

⁹¹ Kolarik, *supra* note 66, at 866.

⁹² *Id.*

taxation.⁹³ The nondiscrimination prong is concerned with tax structures that favor a state's residents over nonresidents.⁹⁴ Finally, the "fairly related to services provided by state" prong concerns whether the amount of tax sought corresponds to the services the state provides the taxpayer.⁹⁵

The first portion of the test deals with whether a remote seller has the requisite substantial nexus with the taxing authority for them to be forced to collect and remit sales tax. Throughout the development of the Commerce Clause doctrine in this area, a debate has emerged between the Commerce Clause and Due Process Clause. This distinction first came in the *Bellas Hess* decision. Justice Stewart gave the opinion of the Court, noting that the requirements of the Due Process Clause and Commerce Clause were similar.⁹⁶ Specifically both require "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax."⁹⁷

Twenty-five years later, Justice Stevens made the distinction between the two referenced above concrete in his opinion in *Quill Corp.* In that decision, the Court said the two clauses are "analytically distinct."⁹⁸ The Court went on to explain that due process concerns the fundamental fairness of governmental activity. The due process nexus requires that the question be asked whether an individual's connection with a state is substantial enough to justify the state's exercise of power. That is why, in these cases, minimum contacts like "notice" and "fair warning" rise to meet the level of control.⁹⁹ In contrast to the Due Process Clause, "the commerce clause and its nexus requirements are informed not so much by concerns about fairness for the individual defendant as by structural concern about the effects of state regulation on the national economy."¹⁰⁰ Therefore,

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 862.

⁹⁷ *Id.*

⁹⁸ *Id.* at 869.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

a corporation or person must have stronger connections such as physical presence for a state to assert control.

This physical presence requirement may seem straightforward; however, in the twenty-four years since the *Quill* decision there have been two approaches adopted: a narrow and broad reading of the physical presence test.¹⁰¹ The narrow view that states have tried to apply is that the *Quill* decision requiring corporations to have a physical presence in the state only applies to sales and use taxes, not income and franchise taxes.¹⁰² In contrast, the broad view is that the *Quill* decision applies to all types of taxes.¹⁰³ There has been significant litigation asserting both claims, however, the focus of this article is on sales and use tax, and in that context the Supreme Court has never taken a different approach regarding the substantial nexus prong of the *Complete Auto* test.¹⁰⁴

The second prong of *Complete Auto* is ensuring the tax structure is fairly apportioned. This prong is broken into two separate parts: internal and external consistency. Internal consistency tends to be the focus. This poses the question: if every state were to establish a similar tax structure as the one in question would it add a burden to interstate commerce through multiple taxation that intrastate commerce would not be exposed to?¹⁰⁵ External consistency looks to the economic justification for the state's claim upon the value taxed, to discover whether the tax reaches beyond the portion of value that is fairly attributable to economic activity within the taxing state.¹⁰⁶

The third prong of *Complete Auto* is ensuring the tax structure is nondiscriminatory. The nondiscrimination provisions of the U.S. Constitution are not explicit. The same problems exist in similar fashion to the substantial nexus prong. Where there are two

¹⁰¹ *Id.* at 871.

¹⁰² *Id.* at 872.

¹⁰³ *Id.* at 873

¹⁰⁴ *Id.*

¹⁰⁵ Michael S. Knoll & Ruth Mason, *Comptroller v. Wynne: Internal Consistency, A Nat'l Marketplace, and Limits on State Sovereignty to Tax*, 163 U. PA. L. REV. ONLINE 267, 272 (2015).

¹⁰⁶ See generally Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193 (1998).

competing constitutional clauses it could lead to different outcomes.¹⁰⁷ In the Supreme Court's view, the Constitution reserves the power exclusively to Congress to regulate commerce. In the absence of federal regulation, the states may not regulate or inhibit interstate commerce, including, applying discriminatory taxes that interfere with interstate commerce.¹⁰⁸ At the same time, the Supreme Court has interpreted the Privileges and Immunities Clause as also prohibiting tax discrimination by one state against another.¹⁰⁹ However, when it comes to changing the laws, the Court allows Congress to pass a law consenting to a discriminatory practice by a state under the Commerce Clause. They are not allowed to do that same practice under the Privileges and Immunities Clause.¹¹⁰ Ultimately, in the sales and use tax domain, the Court uses the Commerce Clause and allows Congress to change or consent to laws. However, as part IV explains, Congress has not acted.

The final prong of *Complete Auto* is straight forward compared to the first three. The Court looks to assure that a corporation or person who a state is looking to tax is receiving benefits from those tax dollars. If the corporations hold no physical presence in the state, no employees living and working in the state, and no distribution centers helping to deliver goods, then they are going to receive minimal if any benefits from their tax dollars. Their deliveries either by U.S. Post Office or by private delivery services would receive protection from the state. However, does that minimal protection equal the amount of tax they could be forced to pay; especially if that tax burden could be in the millions of dollars? Courts have tended to stay on the side of protection for deliveries only, and that it does not outweigh the burden of forcing them to collect and remit sales tax.

IV. STATE AND CONGRESSIONAL ATTEMPTS TO CURTAIL PROBLEM

Since the *Quill Corp* decision in 1992, the states have attempted to create several avenues to force remote vendors to comply with state tax laws. However, these ideas have failed to produce the type of

¹⁰⁷ See generally Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014, 1107.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1108.

results that states are looking for, and absent any Congressional or judicial action, it will remain this way.

The National Tax Association (NTA) formally convened the NTA Project in 1997 to discuss possible plans in response to the *Quill* decision and to help states with their compliance issues. The NTA is an association with a long history as a forum for the discussion and evaluation of tax policy.¹¹¹ The NTA project made recommendations on several points, however, for the purposes of this article the most important recommendation dealt with the first prong of the *Complete Auto* test, the “substantial nexus” test.¹¹² The NTA gave three alternatives: (1) to replace the current nexus standard with a collection duty premised upon vendor’s national or individual single-state volume; (2) maintain the current nexus standard established in such cases as *Quill* and *Oklahoma Tax*; or (3) to clarify further the physical presence (in both qualitative and quantitative terms) that is necessary to establish a vendor’s duty to collect the sales or use tax.¹¹³ However, in all issues addressed by the NTA project they were just recommendations, and even with states signing on in support of the alternatives, the NTA had no legal authority to force remote vendors to collect and remit sales tax or to find a way to force buyers to submit to the use tax.

Three years later, in March of 2000, 44 states and the District of Columbia organized an effort called the Streamlined Sales Tax Project.¹¹⁴ Over the course of several years these participating states developed the Streamlined Sales and Use Tax Agreement (SSUTA).¹¹⁵ The purpose of this agreement is to address the concerns identified in *Quill* by simplifying the complex patchwork of state and local sales and use tax laws in the country.¹¹⁶ The Court in *Quill* said that there were several burdens that out-of-state retailers faced when they had to collect and remit sales tax to states, which is why the physical presence prong developed. To avoid this burden, the SSUTA looked to

¹¹¹ Houghton et al., *supra* note 1, at 15.

¹¹² *Id.* at 30.

¹¹³ *Id.* at 30-31.

¹¹⁴ Gaylord & Haile, *supra* note 88, at 2029.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

increase uniformity of the sales and use tax laws by each of the members enacting legislation to simplify their own tax laws.¹¹⁷ Specifically, the rate structures, definitions, exemption administration, and sourcing standards to name a few.¹¹⁸ The goal of the SSUTA was to reduce the burden of out-of-state retailers but also to persuade Congress to exercise their authority in enacting new legislation to force out-of-state retailers to collect and remit sales tax. However, Congress has failed to act each time legislation is proposed because it is faced with opposition from major online retailers like Amazon and EBay.¹¹⁹

By 2009, New York, North Carolina and Rhode Island enacted so-called “Amazon laws,” which were designed to go after out-of-state retailers who had click-through agreements with states. (CN) These agreements indicate that remote retailers are presumed to be doing business in the state, and therefore obligated to collect sales and use taxes, if the retailer has “an agreement with a resident of this State under which the resident, for a commission or other consideration, directly or indirectly refers potential customers . . . to the retailer.”¹²⁰ In other words, a remote seller has a physical presence in the state when they agree to this click through agreement.¹²¹ Even though states like New York have had success in defending their “Amazon laws,”¹²² they have failed to bring about the type of reform the states hoped they would. The reason for this is that immediately after the laws were passed most of the remote retailers discontinued their click through agreements, leaving the situation in the same location as before.¹²³

North Carolina tried to induce out-of-state retailers to collect and remit taxes by enacting the Internet Transactions Resolution Program (ITR) in 2010.¹²⁴ The idea behind the ITR was to leverage the

¹¹⁷ *Id.* at 2030.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2031.

¹²⁰ *Id.* at 2032.

¹²¹ *Id.*

¹²² Kolarik, *supra* note 66, at 877.

¹²³ Gaylord & Haile, *supra* note 88, at 2034.

¹²⁴ *Id.* at 2034-35.

obligation of remote retailers to collect and remit sales tax under the Amazon law and, in exchange for not prosecuting and waiving all right to collect penalties. Remote retailers who failed to collect sales tax under the law would sign on to collect and remit sales tax to the state for a period of at least four years.¹²⁵ However, as expected only 24 of the 450 remote retailers who received information regarding the ITR program signed on. (CN) Furthermore, major retailers like Amazon did not.¹²⁶

Over the last five years, Congress has taken on the issue of helping the states. On November 9, 2011, the Senate introduced a bill called the Marketplace Fairness Act, which in part would enable state governments to collect sales and use taxes from remote or E-commerce retailers with no physical presence in their state.¹²⁷ This bill failed to pass the Senate. Two years later, on February 14, 2013, the Senate and House introduced similar bills. The Senate again introduced the bill on April 16, 2013, and then on May 6, 2013 it passed the Senate and went to the House where it died.¹²⁸ The Senate again introduced the bill in 2015, where it has been referred to the Finance Committee, where it currently resides.¹²⁹ With powerful lobbies from the remote retailers and election-year politics, it is unlikely the Marketplace Fairness Act will be taken up this term. No matter the new, creative ideas that the states develop to help collect sales and use tax, only if Congress or the Court act will wholesale change occur.

V. RELATIONSHIP BETWEEN DORMANT COMMERCE CLAUSE & OTHER STATE TAXATION ISSUES

Since the inception of the U.S. Constitution, the Supreme Court has consistently held that the language of the Commerce Clause contains a negative command prohibiting certain state taxation laws,

¹²⁵ *Id.* at 2035.

¹²⁶ *Id.* at 2037.

¹²⁷ Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2003).

¹²⁸ Emma Dumain, *Last-Ditch Push to Pass Marketplace Fairness Act in House Falls Short*, ROLL CALL (Dec. 3, 2014), <http://blogs.rollcall.com/218/last-ditch-push-to-pass-marketplace-fairness-act-in-house-falls-short/?dcz> [<https://perma.cc/69AJ-X677>].

¹²⁹ Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015).

even when Congress has failed to legislate on the subject. Unless Congress specifically grants permission to the states to put a burden on interstate commerce through individual state tax codes, the states are prohibited from doing so.¹³⁰

There have been many examples where the Supreme Court has invalidated state taxation laws going back as far as 1872. *Reading Railroad Company v. Pennsylvania* is the first state taxation case that went before the Supreme Court in relation to a possible violation of the Commerce Clause.¹³¹ The Commonwealth of Pennsylvania instituted a new law that was designed to increase state revenue by taxing freight being transported to and from Pennsylvania.¹³² Pennsylvania levied the tax for every two-thousand pounds moved and, depending on what the company moved, the tax ranged from ¢2-5.¹³³ The Reading Railroad Company owed Pennsylvania \$84,881, which equates to \$1.7 million in 2016.¹³⁴

The Supreme Court looked at the use tax levied upon freight being transported to and from Pennsylvania as a burden being placed on interstate commerce. Since the tax placed a burden on interstate commerce and did not try to regulate interstate commerce itself, it fell under the dormant Commerce Clause.¹³⁵ Thus, a state law imposing a tax upon freight or other articles of commerce taken from the state, or taken to the state, falls under Congressional power and can only be changed by an act of Congress.

Over the years, the long-standing doctrine of the Commerce Clause and of the dormant Commerce Clause has been applied to several areas of taxation. A state cannot impose taxes upon persons passing through the state, or coming into it for merely a temporary purpose.¹³⁶ Likewise, a state may not lay a tax for the privilege to engage in interstate commerce.¹³⁷ A state cannot impose a tax, which

¹³⁰ *Id.*

¹³¹ See *Reading R.R. Co. v. Pennsylvania*, 82 U.S. 233 (1872).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 234.

¹³⁵ *Id.*

¹³⁶ *Robbins v. Shelby Cty. Taxing Dist.*, 120 U.S. 489, 493-94 (1887).

¹³⁷ *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609 (1951).

discriminates against interstate commerce either by providing a direct commercial advantage to local business¹³⁸, or by subjecting interstate commerce to the burden of multiple taxation.¹³⁹ Such state tax laws have been struck down by the Supreme Court because the states, under the Commerce Clause, are not allowed one single tax-worth of direct interference with the free flow of commerce.¹⁴⁰

In the middle of the 20th century, after the Court sought the end of a formalistic approach to the dormant Commerce Clause the Court expanded not only the purview of the Commerce Clause but the dormant Commerce Clause as well. The Court expanded the Commerce Clause to include seemingly local actions that ultimately have an impact on interstate commerce.¹⁴¹

In the same period, the Court also looked at a taxation issue in South Carolina.¹⁴² The state passed a tax law that required owners of shrimp boats fishing off the shores of the state to dock at a South Carolina port and unload, pack, and stamp their catch with a tax stamp before being allowed to ship or transport it to another state.¹⁴³ The effect of this tax was to divert to South Carolina employment and business, which might otherwise go to other states. The Court pointed out that the tax was designed to either impose an artificial rigidity on the economic pattern of the industry or to place a burden on interstate commerce and thus declined to enforce the tax.¹⁴⁴

In addition to the general pieces of the doctrine that affect all taxation laws, the Court has also dealt with specific tax statutes, such as an income tax. Since 1918 a net income tax on revenues derived from interstate commerce does not violate the dormant Commerce Clause upon state interference with the commerce.¹⁴⁵ The case law

¹³⁸ *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 389 (1952).

¹³⁹ *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 157 (1954).

¹⁴⁰ *Freeman v. Hewit*, 329 U.S. 249, 256 (1946).

¹⁴¹ See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

¹⁴² See *Toomer v. Witsell*, 334 U.S. 385 (1948).

¹⁴³ *Id.* at 390-91.

¹⁴⁴ *Id.* at 403-4.

¹⁴⁵ *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458-59 (1959).

involving the taxation of income is driven by *Peck & Co. v. Lowe*.¹⁴⁶ The Court held that, though the Constitution provided “no tax or duty shall be laid on Articles exported from any State,” a net income tax on the profits derived from interstate commerce was not “laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.”¹⁴⁷ At most, exportation is affected only indirectly and remotely.¹⁴⁸

The Court furthered the doctrine of the income tax in *United States Glue Co. v. Town of Oak Creek*.¹⁴⁹ Here the Court distinguished between an invalid direct levy, which placed a burden on interstate commerce, and a charge by the way of net income derived from profits from interstate commerce. Taxes may be imposed, although their payment may come out of the funds derived from interstate business, provided the taxes are imposed so that their burden will be reasonably related to the powers of the state and are non-discriminatory.¹⁵⁰ The tax is derived from the activities that the business performs in the state; these activities form a sufficient nexus between the state and the business in order to levy a tax against them.¹⁵¹ In response to the *Northwestern* case, Congress passed the Interstate Income Act of 1959. This statute restricted a state’s ability to collect income tax on solicited sales within its borders, as long as the orders are filled or shipped outside of the state.¹⁵²

The final specific area of taxation that the Supreme Court addressed using the dormant Commerce Clause came in 2015 with *Comptroller of Treasury of MD. v. Wynne*.¹⁵³ This case is another

¹⁴⁶ See *Peck & Co. v. Lowe*, 247 U.S. 165 (1918).

¹⁴⁷ *Id.* at 173-74.

¹⁴⁸ *Id.* at 175.

¹⁴⁹ *U.S. Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 321 (1918).

¹⁵⁰ *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609 (1951).

¹⁵¹ *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464 (1959).

¹⁵² Annette Nellen, *The 50th Anniversary of Public Law 86-272*, AM. INST. OF CPAS (Mar. 27, 2008), http://www.aicpastore.com/Content/media/PRODUCER_CONTENT/Newsletters/Article_s_2008/CorpTax/Public_Law032708.jsp [https://perma.cc/K797-SHQT].

¹⁵³ See *Comptroller of Treasury of Md. v. Wynne*, 135 S.Ct. 1787 (2015).

example of taxation on income, but it specifically deals with an assessment by the state comptroller of county income tax without a credit for payment of out-of-state income taxes.¹⁵⁴ Maryland's personal income tax on state residents consists of a state and county income tax. Residents who pay income tax to another jurisdiction for income earned in that other jurisdiction are allowed a credit against the state tax, but not the county tax. Nonresidents who earn income from sources within Maryland must pay the state income tax and nonresidents not subject to the county tax, must pay a special nonresident tax in lieu of the county tax.¹⁵⁵ Under the precedents, the dormant Commerce Clause precludes states from discriminating between transactions based on some interstate element,¹⁵⁶ meaning that a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within a state.¹⁵⁷ There are three cases that control this area of tax law and the dormant Commerce Clause.

In *J.D. Adams Mfg. Co. v. Storen*, the state of Indiana taxed the income of every citizen and the income of every nonresident earned within Indiana.¹⁵⁸ Indiana levied the tax on income earned by a corporation on sales made out of the State. This tax scheme violated the dormant Commerce Clause because "the vice of the statute taxed . . . without apportionment, receipts derived from activities in interstate commerce."¹⁵⁹ If the income was taxed by the States in which the income was earned, then interstate commerce would be subjected to the risk of double taxation, which the Commerce Clause prohibits.¹⁶⁰ The following year in *Gwin, White & Prince, Inc. v. Henneford* the Court reached a similar result.¹⁶¹ The state of Washington taxed all the income of persons doing business in the State and levied that tax on

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1790.

¹⁵⁶ *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 (1977).

¹⁵⁷ *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

¹⁵⁸ *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 308 (1938).

¹⁵⁹ *Id.* at 309-11.

¹⁶⁰ *Id.*

¹⁶¹ *See Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

income a Washington corporation earned in shipping product to other States and countries.¹⁶² This tax discriminated against interstate commerce, since it burdened it. Also, it increases the likelihood as in *J.D. Adams* that the corporation would face double taxation.¹⁶³ Finally, in *Central Greyhound Lines, Inc. v. Mealey*, New York tried to tax the company's gross receipts, even though a portion of the gross receipts were earned by providing services in other states.¹⁶⁴ Other states might have tried to tax the gross receipts, which would have opened it up to double taxation and the New York scheme placed an undue burden on interstate commerce.¹⁶⁵

In all of these preceding cases, the Court invalidated state tax schemes because the laws could have resulted in the double taxation of income earned out of the state that discriminated in favor of intrastate over interstate economic activity. In the *Comptroller* case, Maryland tried to distinguish the other cases by saying this involves individuals and not corporations. However, the dormant Commerce Clause does not treat individuals more or less favorable than corporations.¹⁶⁶ As a result, the same principles that applied to the three cases above also applied in the Maryland case; making the tax scheme developed by Maryland invalid.

Application of the dormant Commerce Clause to state taxation laws is a manifestation of the Court's holdings that the Commerce Clause prevents individual states from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The Court's taxation decisions thus "reflected a central concern of the Framers that doubled as an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the

¹⁶² *Id.* at 435-37.

¹⁶³ *Id.* at 439.

¹⁶⁴ *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948).

¹⁶⁵ *Id.* at 662.

¹⁶⁶ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 564 (1997).

Colonies and later among the States under the Articles of Confederation.”¹⁶⁷

VI. SALES TAX AND THE DORMANT COMMERCE CLAUSE (PRESENT DAY)

Section VI will use the legal doctrine developed by the Supreme Court in the dormant Commerce Clause progeny, along with the Court's decisions in other taxation issues, to determine whether a state levied sales tax law against E-commerce would withstand challenge.

The Supreme Court has established a four-pronged test to analyze whether a state tax scheme violates the dormant Commerce Clause. State taxation laws must meet all four prongs of the test in order to survive challenge. The parts are (1) a significant nexus must exist; (2) the law is nondiscriminatory; (3) the law is fairly apportioned; and (4) there is a fair relationship to services provided by the state.¹⁶⁸ This four-pronged test is used when the interstate commerce is moving between two or more states.

There are two additional steps if the subject involves the moving of interstate commerce between the United States and another country. This is because “in international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.”¹⁶⁹ The two additional questions that need to be asked if the subject is foreign commerce are: (1) whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation; and (2) whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments.¹⁷⁰

The *Wardair* case is an example of a state taxation law being challenged and running through the now six-part test because of the foreign commerce nature.¹⁷¹ Florida imposed a tax on all aviation fuel

¹⁶⁷ *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 1 (1986).

¹⁶⁸ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 274 (1977).

¹⁶⁹ *Bd. of Tr.'s of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933).

¹⁷⁰ *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 451 (1979).

¹⁷¹ *See Wardair*, 477 U.S. at 1.

sold within the State to airlines, regardless of whether the fuel was used to fly in-state or out-of-state, or whether the airline engaged in a substantial or a nominal amount of business within the State.¹⁷² The *Wardair* airline challenged the law because it authorized assessment of a tax on fuel used by foreign airlines exclusively in foreign commerce, and it went against a federal policy to exempt foreign airlines from fuel taxes and precluded individual states from acting in that area.¹⁷³ The *Wardair* airline case conceded that the four initial parts set out in *Complete Auto* were met, which takes the argument to the two remaining prongs set out in *Japan Line*.¹⁷⁴ In the *Wardair* case, since the tax was imposed only upon the sale of fuel, which occurred in one national jurisdiction, the fifth prong was met.¹⁷⁵ Finally, the tax met the sixth prong because in any document or agreement with Canada the United States never explicitly or implicitly denied the state's ability to levy this kind of tax. In fact, the agreements have affirmatively set out that the State is able to levy such a tax. (CN) The tax scheme passed all six prongs and thus did not violate the dormant Commerce Clause.¹⁷⁶

"The dormant Commerce Clause, in both its interstate and foreign levels, only operates where the government has *not* spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors."¹⁷⁷ The foreign dormant Commerce Clause ensures that the federal government speaks with one voice when regulating relations with foreign governments, but the Court has never even suggested that the federal government *must* speak with any particular voice.¹⁷⁸

There are two prominent Supreme Court cases that set the standard for the sales tax analysis. The first is *Quill Corp. v. North Dakota*.¹⁷⁹ North Dakota tried to require Quill, an out-of-state mail-

¹⁷² *Id.*

¹⁷³ *Id.* at 2.

¹⁷⁴ *Id.* at 8.

¹⁷⁵ *Id.* at 9.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Id.* at 13.

¹⁷⁹ See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

order house with neither outlets nor sales representatives in the State, to collect and pay a use tax on goods purchased for use in the State.¹⁸⁰ Quill's only connection to the State and its customers was through a common carrier or the mail.¹⁸¹ North Dakota argued, using the *Bellas Hess* decision, which Quill did not have to physically be in the state in order for minimum contacts to be set up and thus be able to levy a use tax against them.¹⁸² However, that runs contrary to the dormant Commerce Clause doctrine. In the first major decision since *Bellas Hess*, the Court affirmed that in order for states to tax corporations they must have a physical presence in the state.¹⁸³ This affirmation has continued to stand for the past twenty-four years, and makes the current precedent the Court follows.

The second case is *Oklahoma Tax Commission v. Jefferson Lines, Inc.*¹⁸⁴ The Court used its previous decisions in *Complete Auto*, *Wardair*, and *Quill Corp.* to give a clear analysis of a sales tax scheme and whether it can withstand the challenge by the dormant Commerce Clause. Jefferson Lines, a common carrier, did not collect or remit to Oklahoma the state sales tax on bus tickets sold in Oklahoma for interstate travel, although it did for tickets sold for intrastate travel.¹⁸⁵ In applying the *Complete Auto* test, the Court confirmed that Oklahoma sales tax on purchases for interstate travel did not violate the dormant Commerce Clause.¹⁸⁶ It has long been settled that a sale of tangible goods has a sufficient nexus to the state in which the sale is consummated to be treated as a local transaction taxable by that state.¹⁸⁷

In this case, the activity has a sufficient nexus with Oklahoma, since it is the state where the ticket gets purchased and the service of

¹⁸⁰ *Id.* at 301.

¹⁸¹ *Id.* at 302.

¹⁸² *Id.* at 311.

¹⁸³ *Id.* at 312.

¹⁸⁴ *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

¹⁸⁵ *Id.* at 178.

¹⁸⁶ *Id.* at 200.

¹⁸⁷ *See McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

the bus ride originates.¹⁸⁸ The second prong is to make sure that the tax is fairly apportioned. The tax would not result in a disadvantage being placed on interstate commerce compared to intrastate commerce because no ticket would be subjected to more than one state's tax.¹⁸⁹ There is no argument to be made that the tax discriminates against out-of-state enterprises, and no argument that the tax discriminates against interstate activity.¹⁹⁰ This allows the tax to pass the test and be upheld as a viable tax statute.¹⁹¹

The *Jefferson Lines* case changed the nature of the test. It is a significant turning point because the Supreme Court embraced the idea that the test could change. The Court implicitly recognized that *Complete Auto's* philosophy and analytical framework no longer can be regarded as a one-size fits all solution to every state tax case that comes before it. Rather, the test must be modified in appropriate cases, at least with regard to the fair apportionment prong to reflect important differences in the nature of the tax under review.¹⁹²

The final step is taking the dormant Commerce Clause test with all of the nuances that it contains and applying it to the hypothetical question of whether a state sales tax on E-commerce that moves through interstate commerce or foreign commerce would survive a challenge.

In 2015, the top ten E-commerce vendors brought in over \$150 billion in revenue.¹⁹³ Being able to collect sales tax on that revenue would increase state budgets and services to the people. However, whether the sales tax established for E-commerce in any given state would pass either the four-prong or six-prong test is the question. Six of the top ten E-commerce vendors, including the second biggest in the world, are headquartered outside of the United States and have no

¹⁸⁸ See *Oklahoma Tax Comm'n*, 514 U.S. at 184.

¹⁸⁹ *Id.* at 185.

¹⁹⁰ *Id.* at 196.

¹⁹¹ *Id.* at 188.

¹⁹² Walter Hellerstein, Michael J. McIntyre & Richard Doup, *Commerce Clause Restraints on State Taxation after Jefferson Lines*, 51 TAX L. REV. 47, 108 (1995).

¹⁹³ *Top 10 eCommerce Companies in the World 2015*, MBA SKOOL, <http://www.mbaskool.com/fun-corner/top-brand-lists/13991-top-10-e-commerce-companies-in-the-world-2015.html> [https://perma.cc/2M7U-QXK6].

distribution or formal physical connection to the United States.¹⁹⁴ For the purposes of this note, the scenario will focus on the top four E-commerce retailers; Walmart.com, eBay, JD.com, and Amazon. These four companies provide the ability to analyze the question under several different formats. Walmart.com is the extension of the brick and mortar Wal-Mart, one of the omnichannel retailers explained earlier, which has a presence in all fifty states.¹⁹⁵ eBay is not a physical outlet but has distribution centers in three states and four countries.¹⁹⁶ JD.com, which is headquartered in Beijing, has no physical connection to the United States, but distributes goods in the United States. Finally, Amazon, which is the largest E-commerce retailer in the world, is headquartered in Seattle and has order fulfillment locations in 28 states, 2 in Canada, and several throughout the world.¹⁹⁷

Each situation will primarily focus on the first prong of the test, which incorporates whether the business has the sufficient nexus with the taxing state for them to have to collect and remit a sales tax. Prongs two through six, under ideal circumstances will be met, if the assumption is that this is a normal sales tax and is not meant to be destructive or punitive, but they all have nuances that make it difficult to generalize. The analysis will start with prongs two through six and then focus on the sufficient nexus requirement of prong one.

The second prong of the test ensures that the sales tax is fairly apportioned. A properly apportioned tax must be both internally and externally consistent. If each state set up a sales tax scheme in which it would tax the sale from the origin, meaning buying a product in Ohio subjects the buyer to the Ohio sales tax regardless of if you buy it from in the state or it gets shipped there, then it would be internally consistent since the product would only be subjected to the tax of one state at the same rate as any other product sold in that state. External consistency is harder to quantify, but if the tax is a reasonable value and is consistent across all boards, making sure that no tax on a good

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Fulfillment*, EBAY ENTER., <http://www.ebayenterprise.com/operations/fulfillment> [<https://perma.cc/L7ZP-FLQ6>].

¹⁹⁷ *Amazon Fulfillment Center Locations*, AVALARA TRUSTFILE, <https://trustfile.avalara.com/resources/amazon-warehouse-locations/> [<https://perma.cc/2DJQ-793H>].

for intrastate commerce has a lower sales tax rate than something coming from out-of-state, then the tax would not reach beyond the value attributable to the economic activity.

The third prong is ensuring that the sales tax scheme is nondiscriminatory, meaning that interstate and intrastate taxes should not favor one over the other.¹⁹⁸ This prong can be met using the same analysis from the internal consistency argument. A sales tax would be discriminatory if the state established a 5% sales tax on goods bought in the state, and a 10% sales tax on goods bought out-of-state. This would lead to discrimination against interstate commerce as a consumer would have to pay more for the interstate good, and thus would look to buy the product intrastate to save money. The states are free to have their own statewide sales tax and locality sales tax that are all different across the country because those are only applied to intrastate commerce for which Congress does not have the authority to regulate. However, in an interstate commerce scenario the tax must be consistent throughout the country, and must be equal so as to not discriminate against interstate commerce for the benefit of intrastate commerce.

A sales tax, if equal, would also not discriminate against out-of-state actors, since the good would not be double taxed, and if equal, the out-of-state actor would not worry about having a higher price than in-state actors have since all taxes would be equal.

The fourth and final prong for all *interstate* commerce is a fair relationship to services provided by the state, meaning that companies enjoy other services that the taxes pay for such as police protection while in the state.¹⁹⁹ This prong goes as the first prong goes. If the company being taxed does not have the sufficient nexus with the state, then it probably does not have the requisite relationship to services. If a company, like Amazon, does not have their headquarters or any sort of distribution/fulfillment center in a state, then it is hard to argue that the company enjoys services such as emergency protection. If their distribution centers are located there, then their employees and anyone who works with the distribution center enjoys the benefits of emergency services and others while in the state.

Six of the top ten E-commerce companies, who would be sending all their goods to the United States via *foreign* commerce, have to go through the two additional prongs set out in *Japan*. The first is

¹⁹⁸ Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977).

¹⁹⁹ *Id.*

whether the tax creates a substantial risk of international multiple taxation.²⁰⁰ This prong would be met provided that individual countries do not have a similar tax on the company for selling the product. As long as the sales tax is set up that the tax is levied against the consumer within the state he bought it in or he is shipping it to, the product would not suffer double taxation. The second question for international goods is whether the tax prevents the federal government from speaking with one voice when regulating commercial relations with other governments.²⁰¹ U.S. states are not a party to bi-lateral tax treaties made with other countries.²⁰² Even though a foreign company may not be subjected to federal income tax laws, they may still be subjected to individual state sales tax. The way they would be subjected to the sales tax laws goes back to the sufficient nexus prong, which will be discussed in the proceeding paragraphs. Further, there is no implicit or explicit policy of the United States prohibiting states from assessing sales tax against foreign companies.

The outcome of a challenge to a sales tax on E-commerce in the present day will focus on the first prong, which asks whether there is a sufficient nexus between the taxing authority and the company. Using the top four E-commerce companies, the analysis will take three different routes and have three different outcomes. In theory, any E-commerce retailer would fall under one of these three models, deciding what the outcome of a challenge to a state sales tax would be under the dormant Commerce Clause.

The first model is derived from omnichannel retailers such as Walmart.com. Walmart.com is the fourth biggest E-commerce vendor with \$13 billion in revenue.²⁰³ The sufficient nexus test for this vendor would be met, because Walmart.com is an extension of the brick and mortar stores and the products, which would be moving in interstate commerce, would be coming either from one of their distribution centers or one of their brick and mortar stores. Together Wal-Mart

²⁰⁰ *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 451 (1979).

²⁰¹ *Id.*

²⁰² Sylvia F. Dion, *Tax Treaties and U.S. Sales Tax Nexus: What Foreign Sellers Need to Know*, SALES TAX SUPPORT (June 18, 2013), <http://www.salestaxsupport.com/blogs/industry/us-sales-tax-for-foreign-sellers/tax-treaties-us-sales-tax-nexus-foreign-sellers> [https://perma.cc/Z4YP-XWZP].

²⁰³ *Top 10 eCommerce Companies in the World 2015*, *supra* note 193.

has a presence in all fifty states. Having a physical location in the taxing state is the key to having a sufficient nexus according to *Quill Corp.* After meeting this test all the other remaining tests under *Complete Auto* would be met and a sales tax under these conditions would be valid. These omnichannel stores with their nationwide presence would be subjected to the sales tax on their goods moving in interstate commerce.

The second model involves the two biggest American-based E-commerce providers, which are eBay and Amazon. These two have a combined \$107.89 billion in revenue.²⁰⁴ Both companies do not have a physical location outside of their headquarters, unlike the omnichannel retailers. The only physical presence they have are their fulfillment/distribution centers. eBay has these centers in three states: (Nevada, Kentucky, and Virginia) and has its headquarters in California. Amazon has distributions in just over half of the states, 28 in total. However, this leaves 46 and 22 states respectively with no physical presence. This is a split, where the places that have a physical location would meet the sufficient nexus prong, while the places without a physical location would not. This conclusion is rested upon the notion that a distribution center would count as a physical presence in the state. In order to have a physical presence the retailer must be doing business in that state. Given that nothing is sold from the distribution centers, but only transferred, the remote retailers could make an argument that they are not actually conducting business in those states. The Court has said if the only connection to the state is by mail, then no physical presence exists. This is an argument to be made, but ultimately since the distribution centers are directly under the purview of the retailers themselves, the Court would consider the retailers as having a physical presence.

Given that a sales tax on E-commerce in the case of these two retailers would only encompass half or less of the country it would more than likely become inconsistent, fail the second prong of the test, and become discriminatory in nature. Since not all 50 states could levy this kind of tax, it would place a burden on interstate commerce, as the same exact goods would be taxed depending on what state it would be shipping from/to thus, the total price would be higher for the exact same good.

The final model focuses on the second biggest E-commerce retailer with \$18.5 billion in revenue, and the one in the top four that is wholly

²⁰⁴ *Id.*

in foreign commerce with no physical ties to the United States.²⁰⁵ All the products that JD.com ships are imported through foreign commerce and are then directly shipped to the consumers in the United States. They do not have any distribution/fulfillment centers in the U.S. For foreign retailers the same tests apply, with the added questions as discussed earlier. However, in this model it will again come down to the sufficient nexus prong. There are many examples of a foreign company-maintaining enough ties to the United States to meet the sufficient nexus prong, such as maintaining facilities, maintaining inventory in the U.S., a U.S. headquarters, or places where the inventory can be distributed among others. However, in this model JD.com is headquartered in Beijing and has no physical presence in the U.S., meeting none of those examples listed above. A sales tax levied against foreign commerce with no physical ties to the United States would not satisfy the first prong of the test.

VII. SALES TAX AND THE DORMANT COMMERCE CLAUSE (FUTURE)

Through the analysis in the preceding parts, the doctrine the Court developed appears to contain a glaring hole, which is that in order for states to force remote retailers to collect and remit sales tax, they must have a physical presence in that state. This philosophy when dealing with state sales and use tax laws developed in the *Bellas Hess* decision almost fifty years ago and was then refined in *Complete Auto* in 1977 and *Quill* in 1992, long before the technological and cultural advances of the present day. The interesting aspect of this philosophy is the Court has continued to apply it for the past twenty-four years, sticking to precedent over changing culture and advances in technology.

The challenge for the Court, whose dormant Commerce Clause rulings have attracted criticism over the past quarter-century, is to delineate clear limits on state taxation that promote a national market economy without unduly restricting the states' taxing authority.²⁰⁶ Instead, it appears the Court has engaged in the type of ad hoc decision-making that has substantially reduced the predictive power of its dormant Commerce Clause jurisprudence and has weakened the claims of that jurisprudence to legitimacy.²⁰⁷

²⁰⁵ *Id.*

²⁰⁶ Knoll & Mason, *supra* note 105, at 268.

²⁰⁷ Hellerstein et al., *supra* note 192, at 51.

In the recent Supreme Court case of *Direct Marketing Association v. Brohl*, decided in March of 2015 the majority again relied on precedent when making their decision that the absence of a physical presence in the state means they are not obligated to pay taxes. However, for the first time, a concurring opinion written by Justice Kennedy highlighted the absurdity to keep relying on old precedent in this technological world.²⁰⁸ Justice Kennedy highlights that the revenue generated from E-commerce sales in 2008 was over \$3 trillion, and that less than 4% of sales and use taxes have been collected from remote vendors.²⁰⁹ This has led to a holding pattern that is continuously “inflicting extreme harm and unfairness on the states,”²¹⁰ further resulting in revenue shortfalls in many states and “concomitant unfairness to local retailers and their customers who do pay taxes at the register.”²¹¹

Justice Kennedy’s concurrence is the beginning of a change. Although it may advance slowly through a hyper-politicized Congress, the judiciary will lead the charge regardless. Justice Kennedy signaled the change in thinking at least among one of the more conservative justices. In addition, the Supreme Court could undergo major change with the current opening as well as three other justices over the age of 77.²¹²

Technology is growing too fast for the physical presence test to stand. The Court’s decision will not even have to override precedent, which as we have seen in other decisions that Chief Justice Roberts values continuity and avoids overruling a decision that could unwind previous case law.²¹³ The Court would be able to amend the test they established in *Complete Auto* to redefine what meets the substantial nexus prong. Instead of a physical presence as it currently requires, the Court could transition the test to mean the same thing it does in the due process context, which are minimum contacts with a state.

²⁰⁸ *Direct Mktg. Ass’n v. Brohl*, 135 S.Ct. 1124, 1135 (2014).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/Y3X5-FZLA>].

²¹³ *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

Online sales and a presence with citizens of individual states would count as minimum contacts and force remote retailers to collect and remit sales tax.

Changing the substantial nexus prong would also mean amending the fourth prong as well. The Court would have to develop a consensus about the services that a state must provide in order for the taxpayer to receive back what they are putting in. In theory, the Court would have to lower the threshold, since there are little services other than protection for the shippers that, a state could provide to a remote seller with no connections to a state.

A change in doctrine would also make the results much fairer for all parties involved. Another prong of the *Complete Auto* test is that the taxation laws should not burden or discriminate against interstate commerce, making it a better situation for someone to buy in-state than out-of-state. However, with the technological advances the discrimination has actually switched. Consumers can buy products online that are cheaper (because the retailers can list prices lower without taxes), and then have no way to be forced to pay the use tax. The current doctrine is now discriminating against intrastate commerce, since the higher prices are driving consumers to the online stores.

Making these changes based on technological advancement would not even be the first time the Supreme Court has adopted new guidelines and amendments to their doctrines. In the face of new privacy concerns under the 4th amendment, the Court has adopted new guidelines to prevent the encroachment on privacy. Such as the case of *Daily Times Democrat v. Graham*,²¹⁴ dealing with phone cameras and *Kyllo v. United States*, dealing with thermal imaging technology.²¹⁵ Surely the Supreme Court will be facing challenges in relation to drone technology in the coming years as well.²¹⁶ If the Supreme Court has already shown a propensity to change policies to reflect current culture and technological advancement, as well as shown they are willing to extend the scope of the dormant Commerce Clause when they brought in Puerto Rico, there is no reason they should not redraw the guidelines to create a fairer system that reflects the present and future.

²¹⁴ *Daily Times Democrat v. Graham*, 275 Ala. 380 (1964).

²¹⁵ *Kyllo v. United States*, 533 U.S. 27 (2001).

²¹⁶ See Jonathan Olvito, *Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy*, 74 OHIO ST. L.J. 669 (2013).

The Internet has caused far-reaching systematic and structural changes in the economy, and in many other societal dimensions. As a result, a business may be present in the state in a meaningful way without that presence being physical in the traditional sense. Given the changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of past decisions and a move towards making the system fair and representing present day culture.²¹⁷

VIII. CONCLUSION

State taxation statutes and the dormant Commerce Clause have been going back and forth for the past 150 years. The dormant Commerce Clause has been refined time and time again into the six-part test developed from *Complete Auto* and *Japan Line*. Many different kinds of taxation schemes, from income taxes, to use taxes, sales taxes, and even credits from state to state have been analyzed. With the test in its current form, it relies on the taxing state and the company having a sufficient nexus with each other. Given the way the test has developed, it can be concluded that omnichannel retailers, which have a physical presence in all fifty states and just happen to have a strong online presence as well, would be subjected to a constitutional sales tax.

However, wholly online retailers both domestic and foreign that have either no physical presence or a physical presence in only a portion of the states would not meet the sufficient nexus, consistency or nondiscriminatory prongs of the test that would force these companies to submit to a sales tax. With the sufficient nexus portion of the test relying on an actual physical presence, it will exempt these wholly online retailers until either the Supreme Court reviews their decisions in light of a new era where so much interstate commerce is moved through these online retailers or Congress drafts legislation like the Marketplace Fairness Act to overrule the Court, making these online retailers submit to online sales tax laws even if they have no physical presence in these states.

As more states move to a sales tax revenue structure and more shopping is done through the online retailers it will eventually come to bear whether the Supreme Court in this new era, makes a change subjecting retailers to these taxes, or if Congress will finally step in. In

²¹⁷ See *Direct Mktg. Ass'n*, 135 S.Ct. at 1124.

any case, there is not a change coming soon. Therefore, states are left to try to collect the sales taxes they can from out-of-state businesses or they can attempt to collect sales tax from their own citizens making these purchases. Of course, neither have a high success rate. Therefore, they would have to move forward not expecting to collect sales tax on these purchases and making sure that the state revenue stream is not based on the collection of these taxes. In the meantime, lobby hard for a national bill legalizing sales tax on E-commerce moving in interstate commerce.